No. 09-908

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

DEBORAH ORLANDO COONEY,

Petitioner,

v.

LYLE ROSSITER, JR., M.D., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT KATHRYN BISCHOFF

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COUNTER-STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Whether Petitioner has set forth compelling reasons for the granting of a Writ of *Certiorari* where the Seventh Circuit Court of Appeals properly applied well-settled and long-standing law in ruling that a child representative and a custodial evaluator, who were appointed by the trial court to assist it in determining the best interests of the children in a child custody proceeding, were entitled to absolute quasi-judicial immunity with respect to conspiracy allegations brought pursuant to 42 U.S.C. § 1983 ("§ 1983").

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STATEMENT OF THE CASE

I. COUNTER-STATEMENT OF FACTS ALLEGED IN PETITIONER'S AMENDED COMPLAINT

Respondent, Kathryn Bischoff ("Ms. Bischoff"), hereby submits her separate Counter-Statement of Facts, which contains an accurate description of the full allegations in Petitioner's Amended Complaint and supporting exhibits. Even when taken in the most favorable light to Petitioner, the Amended Complaint did not sufficiently state a claim for relief.

A. Introduction

Petitioner, Deborah Orlando Cooney ("Petitioner"), is a mother who lost custody of her two minor children after a protracted custody proceeding against her ex-husband, Lorenzo Orlando ("Mr. Orlando") in the Circuit Court Winnebago County, 17th Judicial Circuit, Illinois (the "Custody Matter"). Judge Steven Nordquist ("Judge Nordquist"), the presiding judge in the Custody Matter, based his custody determination upon the conclusions and recommendations of Respondent, Dr. Lyle Rossiter Jr., M.D. ("Dr. Rossiter"), a forensic psychiatrist who had been appointed by Judge Nordquist pursuant to 750 ILCS 5/605 as a custodial evaluator. Specifically, Dr. Rossiter opined that Petitioner had been inflicting a form of child abuse upon her eldest son because she had Munchausen's by Proxy

Syndrome.[1] Dr. Rossiter recommended that custody be immediately transferred to Mr. Orlando.

During the custody proceedings, Judge Nordquist also appointed Ms. Bischoff as a "child representative" pursuant to 750 ILCS 5/506 with the responsibility to assist the trial court in determining the best interests of the children.

On June 15, 2005, Judge Nordquist accepted Dr. Rossiter's conclusions and recommendations and ordered the transfer of custody of the children to Mr. Orlando, further ordering that Petitioner have no contact with them. (the "Custody Order"). Dissatisfied with the Custody Order, Petitioner filed this suit, alleging that Judge Nordquist was at the center of a far-reaching conspiracy (that allegedly included Ms. Bischoff and Dr. Rossiter) to deprive her of custody of her children in violation 42 U.S.C. § 1983 ("§ 1983").

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1. "Munchausen by Proxy," also referred to as "Factitious Disorder by Proxy" is a form of maltreatment wherein the perpetrator (usually a mother) deliberately induces or exaggerates a physical or psychological problem in the victim (usually a child) for personal gratification. *See, e.g., In re Guardianship Of Rebecca B.*, 621 N.W.2d 289, 293 (Neb. 2000); *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1238 (10th Cir. 2003); *Adoption Of Keefe*, 733 N.E.2d 1075, 1076 (Mass. App. Ct. 2000).

B. Petitioner's Conclusory Allegations Of Wrongdoing Against Ms. Bischoff Are Incomplete And Misleading

In her Statement of Facts, Petitioner simply states in conclusory fashion that Ms. Bischoff "directed" Judge Nordquist to appoint Dr. Rossiter, and thereafter:

> Rossiter and Bischoff engaged in numerous fraudulent and intentional acts of misconduct in concert with other actors involved in the custody proceedings. They both engaged in fraudulent misconduct while conducting an investigation. Following the investigation, Rossiter prepared a fraudulent report which was submitted to the court, and Rossiter relied on his report when he testified at trial. As a result of this misconduct, Petitioner's children were removed from her custody and Petitioner was prohibited from contact with her children.

Not only does Ms. Bischoff strongly disagree with Petitioner's conclusory characterizations of her conduct in the underlying custody dispute, she wishes to call this Court's attention to the following additional facts alleged in Petitioner's Amended Complaint.

C. Additional Facts Alleged In Petitioner's Amended Complaint

The following additional facts are set forth in Petitioner's Amended Complaint and exhibits.

1. The Court's Appointment of Ms. Bischoff and Dr. Rossiter

On October 17, 2002, Judge Nordquist appointed Ms. Bischoff as "child representative" pursuant to 750 ILCS 5/506 for the purpose of assisting him in deciding the Custody Matter. Ms. Bischoff was charged with the responsibility of advocating the best interests of the children. (*See* A.195)[2]

On July 13, 2003, Petitioner made a motion for a psychological evaluation of her children in relation to the Custody Matter. (A.210 at ¶ 1) In late August and early September 2004, Dr. Rossiter was contacted by Mr. Orlando's current wife, Laurie Orlando ("Mrs. Orlando"). Mrs. Orlando informed Dr. Rossiter about the history and nature of the custody dispute between Mr. Orlando and Petitioner, further informing him that eldest son had medical problems and "may be self mutilating." Dr. Rossiter suggested Mrs. Orlando call him back with information regarding the number of

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2. Citation to "A." preceding any number, refers to the page in the Appendix attached to Petitioner's appeal to the Seventh Circuit Court of Appeals. Citation to "R." refers to the Record on Appeal. Citation to "Loose Pl." refers to the Loose Pleadings of the Record on Appeal. "R." and "Loose Pl." citations will include reference to the volume, document and page number of the document referenced.

records, past mediation attempts, past "psych" examinations. Dr. Rossiter further requested Mrs. Orlando to "get all records" or to have Ms. Bischoff contact him regarding the same. Dr. Rossiter also subsequently spoke with the Petitioner regarding his potential appointment. (*See Id.* at ¶ 2; *see also* Ex. 32 thereto at Loose Pl. Vol. 2, Doc. 310-4, P. 112-15)

On September 23, 2004, without objection from any party, Judge Nordquist appointed Dr. Rossiter as custodial evaluator pursuant to 750 ILCS 5/605. (A.210 at ¶2) Judge Nordquist further ordered that that Ms. Bischoff was the only attorney permitted to initiate contact with Dr. Rossiter. (*Id.*; *see also* Loose Pl. Vol. 3, Doc. 310-1, P. 1-4)

2. Correspondence Between Dr. Rossiter and Ms. Bischoff Regarding His Appointment

On October 19, 2004, Ms. Bischoff sent Dr. Rossiter a letter introducing herself as the "court-appointed" child representative "and therefore the only attorney involved in the case with whom you may have contact, pursuant to the Court's Order." Ms. Bischoff further informed Dr. Rossiter that after reading the medical reports regarding the eldest son, that she was concerned that "this may be a situation of Munchausen syndrome (on the part of the mother)." (Loose Pl. Vol. 2, Doc. 310-4, P. 116-17)

On May 5, 2005, Ms. Bischoff wrote a letter to Dr. Rossiter informing him *inter alia*, that the Court hoped to have his report by June 6, 2005. Ms. Bischoff further wrote that "[Mr. Orlando's] has asked that I express to

you his client's desire that your report be completed as quickly and expeditiously as possible believing that whatever the report contains [Petitioner] will contest and wish to conduct depositions." (A.212-A.213; Loose Pl. Vol. 2, Doc. 310-4, P. 120)

3. Dr. Rossiter's Report, The "Gag" Order, And The June 15, 2005 Custody Order

On June 10, 2005, Dr. Rossiter completed his report in which he made, *inter alia*, the following very troubling conclusions and recommendations:

> (1) Petitioner has "made numerous attempts over a ten year period to induce a great many doctors into making unwarranted diagnoses of severe illnesses or injuries to [her eldest son] by fabricating and exaggerating symptoms which he has never had or had in only a minor degree. . . . mostly oriented around alleged systematic, but actually self-inflicted skin lesions. The results . . . constitute a Munchausen's-by-proxy syndrome. The motivations . . . are reasonably clear: [Petitioner] has attempted to satisfy her own emotional needs and desires with the attentions of health care providers, with excessive immersion in [her eldest son's] care, and with a malicious agenda to punish [Mr. Orlando].

(2) At a cost to the children and direct contradiction to their best interests Petitioner and her parents share delusional beliefs that Mr. Orlando is a criminally dangerous monster bent on harming [the eldest son] and ruining the lives of Petitioner and her family.

(3) [The eldest son's] emotional problems are a result of his being raised by his mother and maternal grandmother;

(4) The "accumulated mental and emotional injuries to [the eldest son] . . . constitute reportable child abuse by [Petitioner] and her parents."

(Loose Pl. Vol. 2, Doc. 310-6, P. 32-33)

Dr. Rossiter further observed that Petitioner, with the support of her parents, suffered delusions and distorted perceptions that have led them to "view [Mr. Orlando] and the legal system as corrupt, unjust, dangerous, and even conspiratorial." Dr. Rossiter further recommended that the children be placed in the sole and immediate custody of their father, Mr. Orlando. (Id. at P. 35-36)

On June 14, 2005, Ms. Bischoff, the attorney for the father (Defendant Dan Cain), and Petitioner's attorney participated in a "chamber conference." During this conference, having been apprised that Dr. Rossiter had completed a draft report, Judge Nordquist put into effect a "gag" order that barred the attorneys from

disclosing the contents of Dr. Rossiter's report to their respective clients (Mr. Orlando and Petitioner) until Judge Nordquist could verify with Dr. Rossiter whether his report was final.[3]

The next day, Dr. Rossiter submitted an affidavit attesting that his "draft" report was actually his final report. Upon learning this information, at a hearing on that day, Judge Nordquist lifted the "gag" order and permitted the attorneys to disclose the report to their respective clients. The Court further permitted Mr. Orlando's attorney to file *instanter* a petition for an order of protection and for an immediate change in custody. Judge Nordquist ruled that Dr. Rossiter's report was a "very thorough . . . [and] very comprehensive report [that] contains very serious and disturbing conclusions and recommendations which I accept. . . ." Accordingly, Judge Nordquist entered the Custody Order. (Loose Pl. Vol. 2, Doc. 310-7, P. 20)

II. COURSE OF PROCEEDINGS

This case was originally filed in May 2007 as a class action by Petitioner (and two other plaintiffs who also lost custody of their children in proceedings presided over by Judge Nordquist) against the Respondents and numerous other defendants, including Judge Nordquist; Dan Cain, the attorney for the father; Brian Klaung, a therapist who treated petitioner's children after the

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3. As the transcript from the June 15, 2005 hearing reveals, this "gag" order was entered because the report of Dr. Rossiter was labeled as a "draft" and had not been signed. (*See* Loose Pl. Vol. 2, Doc. 310-7, P. 5-7)

entry of the Custody Order and who reported the Petitioner to Illinois' child welfare agency ("DCFS"); DCFS and its director; and Daniel Baechle, the Administrative Law Judge who made a finding that Petitioner had committed child abuse. All Defendants to that action, including the Respondents, filed Motions to Dismiss pursuant to Fed. R. Civ. P. 12(b), which attacked the legal sufficiency of Petitioner's and her co-plaintiffs' Complaint. While those Motions to Dismiss were pending, Petitioner and her co-plaintiffs moved to voluntarily dismiss the complaint without prejudice. The District Court granted that motion on October 22, 2007, and gave the plaintiffs 90 days to re-plead.

On January 7, 2008, Petitioner and her co-plaintiffs filed their Amended Complaint, which, as Petitioner subsequently acknowledged in her appeal to the Seventh Circuit, was nothing more than the original complaint with a few very minor changes. Defendants renewed their respective Motions to Dismiss. On August 20, 2008, the District Court granted all motions to dismiss with prejudice, entered judgment in favor of the Defendants and terminated the case.

On September 4, 2008, Petitioner alone moved to vacate the judgment pursuant to Rule 59(e) and for leave to file a Second Amended Complaint related only to her claims. On September 23, 2008, the District Court denied that motion.

Petitioner subsequently appealed with respect to the District Court's dismissal of her claims against the Respondents, Judge Nordquist, Mr. Cain (the father's attorney), and Mr. Klaung (the therapist who allegedly

reported Petitioner to DCFS). Petitioner argued that the District Court erred in finding that Respondents were entitled to absolute quasi-judicial immunity. Petitioner further argued that that the District Court erred in finding that the Amended Complaint did not sufficiently state a claim for conspiracy against Mr. Cain and Mr. Klaung, and finally Petitioner argued that the District Court erred in denying her leave to file her Second Amended Complaint pursuant to Fed. R. Civ. P 59(e).

On September 30, 2009, the Seventh Circuit Court of Appeals affirmed the District Court's August 20, 2008 dismissal order. Petitioner filed a petition for rehearing or for rehearing *en banc*, which was denied by the Seventh Circuit Court of Appeals on October 29, 2009.

REASONS FOR DENYING THE PETITION

The instant Petition should be denied because Petitioner erroneously suggests that this Court has not sufficiently addressed the application of immunity in the context of court appointed child advocates and custody evaluators. Additionally, Petitioner erroneously claims that a split in authority exists among the federal circuits by: (1) erroneously comparing the Respondents to executive branch "social workers" who *initiate* child custody and removal proceedings, rather than properly classifying them as court-appointed officials enlisted to assist the court; and (2) erroneously analyzing this case under an inapplicable "prosecutorial immunity" framework, rather than the well-settled "quasi-judicial immunity" framework that was applied by the Seventh Circuit. As such, there are no compelling reasons to grant the Petition.

Further, even if Petitioner's arguments were accurate, which they are not, it would not change the proper outcome of the case. Indeed, although the issue of the sufficiency of Petitioner's conspiracy allegations against Ms. Bischoff was never reached by the Seventh Circuit because it found that Ms. Bischoff was entitled to absolute immunity, the Seventh Circuit made clear that the allegations in the Petitioner's Amended Complaint failed to state a valid claim for conspiracy against her under § 1983. Indeed, as the Petitioner conceded in the proceedings below, as a non-state actor, Ms. Bischoff could only be liable under § 1983 if she conspired with a state actor (the presiding Judge Nordquist in this case). Petitioner's conspiracy allegations against Ms. Bischoff fell far short of that necessary to state a valid claim.

I. THE SEVENTH CIRCUIT PROPERLY APPLIED WELL-SETTLED LAW REGARDING QUASI-JUDICIAL IMMUNITY

Petitioner does not challenge that this Court has long held that quasi-judicial immunity is a viable defense, and that where properly applied, such quasi-judicial immunity is absolute. Rather, Petitioner mistakenly contends that absolute quasi-judicial immunity was misapplied in this case because: (1) the roles of custodial evaluator and child representative did not exist in 1871, when § 1983 was enacted, and thus they could not have been immune under the common law; and (2) that the lower courts mistakenly ruled that the Respondents were acting in a quasi-judicial capacity. Neither of these

contentions is accurate, nor does either create a compelling reason for granting the Petition.[4]

A. Ms. Bischoff, As A Court-Appointed Child Representative, Was Performing A Quasi-Judicial Function

As a threshold matter, the application of quasi-judicial immunity to Ms. Bischoff depends upon whether she was acting in a quasi-judicial capacity. As Petitioner grudgingly acknowledges, this Court has used a "functional approach" to determine whether individuals were acting in a quasi-judicial role. *See Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 436-37 (1993). Based upon well settled legal principles, it is undeniable that Ms. Bischoff, as a court-appointed child representative was acting in a quasi-judicial capacity.

There can be no question that Ms. Bischoff was appointed as a matter of routine to aid the county circuit court in the disposition of a matter involving the custody of minors. The Illinois Marriage and Dissolution of Marriage Act provides that "[t]he court shall determine custody in accordance with the best interest of the child." 750 ILCS 5/602. Indeed, Illinois courts have affirmed that where a custody matter is before the court, "the issue that singly must be decided is the best interest of the child." *In re Austin W.*, 823 N.E.2d 572, 583 (Ill. App. Ct. 2005) (citation omitted). "A child's best

4. Although this Brief in Opposition addresses Petitioner's arguments as they relate only to Ms. Bischoff, she concurs with the arguments of Respondent Dr. Rossiter, who has filed a separate brief in opposition to the Petition.

interest is not part of an equation. It is not to be balanced against any other interest. In custody cases, a child's best interest is and must remain inviolate and impregnable from all other factors . . . ." *In Re Ashley K.*, 571 N.E.2d 905, 932 (Ill. App. Ct. 1991). As demonstrated below, child representatives are important tools at the court's disposal to aid it in making that ultimate determination.

As the Seventh Circuit recognized, under Illinois law, "in any proceedings involving the support, custody, visitation, education, parentage, property interest, or general welfare of a minor or dependent child, the court may, on its own motion or that of any party, appoint an attorney to serve in one of the following capacities to address the issues the court delineates: (1) to represent the child as an attorney would represent an adult, (2) to be the child's representative, or (3) to be the child's guardian *ad litem*. *See Cooney v. Rossiter*, 583 F.3d 967, 969 (7th Cir. 2009) (discussing 750 ILCS 5/506(a)). The powers and duties of a child representative are very similar to those of a guardian *ad litem*. *See Id.*

In short, while both child representatives and guardians *ad litem* are tasked with the sole duty to assist the court with a determination related to a minor child, they have different powers and means to transmit that information to the court. *See*, 750 ILCS 5/506(a). For example, whereas a guardian *ad litem* is not bound to consider the wishes of the child, a child representative "shall consider, but not be bound by, the expressed wishes of the child." *Id.* Further, whereas a guardian *ad litem* makes a recommendation to the court based upon their investigation, the child representative "shall

not render an opinion, recommendation, or report to the court and shall not be called as a witness" but instead the child representative's recommendations shall be advanced through "evidence-based legal arguments." *Id.; see also In re Marriage of Bates*, 819 N.E.2d 714, 726 (Ill. 2004). Accordingly, it is clear that while the means at their disposal may differ, ultimately, both guardians *ad litem* and child representatives serve the same function as "arms of the court" – to assist the court in its determination of the best interests of the children. *See Cooney*, 583 F.3d at 969; *see also* 750 ILCS 5/506(a). Child representatives serve no other purpose.

B. This Court Has Long Recognized Quasi-Judicial Immunity, Which Existed in 1871

This Court has long recognized a judicial immunity rooted in the common law. *See Cleavinger v. Saxner*, 474 U.S. 193, 199-200 (1985). Indeed, "[f]ew doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction." *Id.* (quoting *Pierson* v. *Ray*, 386 U.S. 547, 553-554 (1967)).

This Court has also long extended absolute immunity to those who perform functions closely associated with the judicial process. *See, e.g., Imbler v. Pachtman*, 424 U.S. 409, 430 (1976) (holding that activities that are "intimately associated with the judicial . . . process" are entitled to absolute quasi-judicial immunity); *see also Butz v. Economou*, 438 U.S. 478, 512 (1978). In *Butz*, this Court specifically addressed the "cluster of immunities protecting the participants in judge-supervised trials," concluding that "absolute

immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation." *Id.* Indeed, such immunities are necessary because "the loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus." *Id.* (citing *Pierson v. Ray*, 386 U.S. 547, 554 (1967)).

Relying heavily on a dissent to this Court's denial of a petition for a Writ of *Certiorari* in *Hoffman v. Harris*, 511 U.S. 1060 (1994) (Thomas, J. dissenting), Petitioner argues that Ms. Bischoff is not entitled to absolute immunity from liability in an action brought pursuant to § 1983 because her job function did not exist in 1871 when § 1983 was enacted. Specifically, Petitioner seizes upon a statement made in that *Hoffman* dissent that a state actor seeking absolute immunity under § 1983 against liability must show that a counterpart privilege was recognized in common law in 1871, and that the dissent believed that it was not clear that the "social workers" in that case met that criteria. *Id.* at 1060 (citing *Burns v. Reed*, 500 U.S. 478, 498 (1991) (Scalia, J., concurring in judgment in part and dissenting in part)). Petitioner's reliance on this non-precedential remark is misplaced.

As a threshold matter, the facts in *Hoffman* make it completely inapplicable in this case. Unlike the instant case, which involves a person appointed by the court to aid it in a custody determination and who seeks protection from liability pursuant to principles of quasi-judicial immunity, *Hoffman* involved a question related to child welfare agency "social workers" working under

the auspices of the executive branch who had *instituted* court proceedings alleging abuse and neglect against the parents of a child and who sought protection from liability pursuant to principles of quasi-prosecutorial immunity. *Hoffman*, 511 U.S. at 1060.

In this case, Ms. Bischoff's court-appointed role was not quasi-prosecutorial, nor was her role in any way similar to that of the "social workers" in *Hoffman*. Unlike the *Hoffman* "social workers," Ms. Bischoff: did not initiate the custody proceeding or an investigation; did not work for the government or a child welfare agency; and was not pursuing the interests of the government through quasi-police or quasi-prosecutorial action in furtherance of the goals of the executive branch. Rather, Ms. Bischoff was brought into an existing custody matter between private parties at the pleasure of, and to assist the *court* in carrying out the judicial function of determining the best interests of the children — a determination necessary for the court to rule on the competing custody claims of the parties.

Addressing the underlying issue raised by the dissent in *Hoffman* as it relates to this case, when the role of child representative is properly analyzed it is clear that a counterpart privilege was recognized in 1871. Indeed, this Court has long recognized that judicial immunity flows from the common law immunities existing in 1871. *See Pierson*, 386 U.S. at 554. Importantly, immunity arising from that judicial immunity for officials/persons functioning in a quasi-judicial capacity also clearly existed in 1871. *See Butz*, 438 U.S. at 510 (discussing "common-law precedents extending absolute immunity to parties participating in the judicial process:

judges, grand jurors, petit jurors, advocates, and witness"); *Imbler*, 424 U.S. at 417-19 (discussing the immunity granted to prosecutors as "derivative" of judicial immunity); *Pierson*, 386 U.S. at 554-55 (1967) (discussing the common-law existence of immunity for legislators and judges). Notably, and contrary to Petitioner's theory, in *Pierson*, this Court specifically discussed the fact that those acting in a judicial role had been granted absolute immunity from suit at common law since long before the passage of the Civil Rights Act of 1871. *Id.* at 554 fn. 9.

Indeed, not only has this Court long-recognized such quasi-judicial immunity, but it has actually provided clear guidance to the lower Courts to make such a determination by delineating the following analysis for determining whether an official is acting in such a quasi-judicial capacity: "(a) the need to assure that the individual can perform his functions without harassment or intimidation; (b) the presence of safe-guards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of error on appeal." *Cleavinger*, 474 U.S. at 201.

Notably, a District Court applying the *Cleavenger* factors to a child representative, in a strikingly similar case to the instant case found that " [the *Cleavenger*] factors weigh strongly in favor of granting a [child representative] absolute immunity." *Golden v. Nadler, Pritikin & Mirabelli, LLC*, No. 05 C 0283, 2005 WL

2897397 at *10 (N.D. Ill. Nov. 1, 2005). Specifically, the *Golden* court explained that,

> [c]hild custody battles can be emotionally charged, and child representatives in contentious cases may be subject to harassment and intimidation if they are not immune from suit. Further, the dissatisfied party can bring any concerns before the state court judge if the child representative has acted inappropriately. While in theory the process should not be adversarial because all parties in a custody proceeding should be concerned with the best interests of the child, in practice these proceedings are often adversarial because the parties disagree as to what those interests are. These factors show that absolute immunity is appropriate for child representatives involved in custody determinations.

Id.

The "*Cleavenger*" factors clearly demonstrate that the Ms. Bischoff performed a judicial function in this case. Indeed, all of the factors necessary for extending absolute immunity to Ms. Bischoff in this case were addressed by the courts below and found to weigh in favor of immunity. "When judicial immunity is extended to officials other than judges, it is because their judgments are 'functionally comparable' to those of judges – that is, because they, too, 'exercise a discretionary judgment' as a part of their function." *Snyder v. Nolen*, 380 F.3d 279, 286 (7th Cir. 2004)

(citations omitted). As the Seventh Circuit concluded in this case, Respondents "are arms of the court much like special masters, and deserve protection from harassment by litigants just as judges do." *Cooney*, 583 F.3d at 970.

Finally, there is no dispute that Ms. Bischoff was acting within the scope of her court-appointed role with respect to the alleged wrongdoing. As the Seventh Circuit observed,

> although [Petitioner] charges that Rossiter and Bischoff were part of an illegal conspiracy to deprive her of custody of the children, they are entitled to absolute immunity because the specific acts (actual or alleged) of which she complains, such as that Bischoff and Rossiter communicated with each other about their perceptions of [Petitioner] and the children, that the conclusions in Rossiter's report are false, and that Bischoff may have given a draft copy of the report to [the father's attorney] but not to [Petitioner], all occurred within the course of their court-appointed duties. [Petitioner] does not allege that Rossiter or Bischoff engaged in misconduct outside that course . . . .

Id. Accordingly, this Court should, consistent with its actions in *Hoffman*, deny the Petition.

II. THERE IS NO SPLIT IN AUTHORITY WITH RESPECT TO THE APPLICATION OF ABSOLUTE QUASI-JUDICIAL IMMUNITY FOR THOSE SERVING IN FUNCTIONS SIMILAR TO CHILD REPRESENTATIVES

Petitioner erroneously claims that there is a split in applicable authority among the circuits with respect to the proper application of immunity. As demonstrated above, child representatives are best compared to the role of guardians *ad litem* in custody proceedings – ultimately differing only in the means at their disposal to assist the court. Accordingly, the analysis of the relevant body of law regarding immunity should include analysis of guardians *ad litem* who perform similar roles, and not executive branch child welfare agency workers or "social workers" as Petitioner suggests. When that proper comparison is made, it is clear that the circuits that have addressed the issue have unanimously found that guardians *ad litem* are entitled to absolute quasi-judicial immunity. *See, e.g., Fleming v. Asbill*, 42 F.3d 886, 889 (4th Cir. 1994); *Kurzawa v. Mueller*, 732 F.2d 1456, 1458 (6th Cir. 1984) ("A failure to grant immunity would hamper the duties of a guardian *ad litem* in his role as advocate for the child in judicial proceedings."); *McCuen v. Polk County, Iowa*, 893 F.2d 172, 174 (8th Cir. 1990) (holding that a GAL was absolutely immune); *Cok v. Cosentino*, 876 F.2d 1, 3 (1st Cir. 1989); *Scheib v. Grant*, 22 F.3d 149, 157 (7th Cir. 1994) (holding that absent absolute immunity, the specter of litigation would hang over a guardian *ad litem's* head, thereby inhibiting a guardian *ad litem* in performing the duties essential to the welfare of the child whom the guardian *ad litem* represents; *Short by Oosterhous v. Short*, 730 F. Supp. 1037, 1039 (D. Colo. 1990).

Notably, Petitioner makes no attempt to distinguish child representatives from guardians *ad litem* and accordingly she ignores that well-settled, unanimously applied case law addressing quasi-judicial immunity. Rather, Petitioner erroneously identifies a "split in authority" that does not exist by focusing on inapplicable cases relating to child welfare workers (like those at issue in *Hoffman*) whose immunity defenses were analyzed under an entirely different framework from the guardian *ad litem* cases (i.e. quasi-prosecutorial immunity or witness immunity *versus* quasi-judicial immunity). Indeed, each of the cases discussed or referenced by Petitioner at pp. 18-20 of her Petition that purportedly demonstrates a "circuit split" relate to situations involving "social workers" who worked for government agencies responsible for child welfare, who act under the auspices of the executive branch and who either brought complaints or petitions against the parents, or who investigated or assisted other agencies in investigating suspicions of child abuse or neglect. None of the cases cited by Petitioner involves court appointed child representatives or guardians *ad litem* concerned with assisting the court in custody disputes between private parties.

As demonstrated above, child representatives serve entirely different functions from those persons categorized as "social workers" by Petitioner. Accordingly, even if there were a split in authority with respect to whether "social workers" are absolutely immune pursuant to quasi-prosecutorial or witness immunity standards, such split has no bearing on the issues in this case.

III. OTHER REASONS FOR DENYING THE PETITION

A. The Issues in *Pottawattamie* Are Not Similar To The Instant Case

As one of her compelling reasons for granting her Petition, Petitioner asserts that her Petition is analogous to the question presented in the matter of *Pottawattamie County, Iowa v. McGhee*, 129 U.S. 2002 (No. 08-1065, 2009), in which this Court recently granted a *writ of certiorari*. *See McGhee v. Pottawattamie County, Iowa*, 547 F.3d 922 (8th Cir. 2008). However, the *Pottawattamie* case simply is not analogous to this case.

In *Pottawattamie*, the question presented to this Court in was:

> Whether a prosecutor may be subjected to a civil trial and potential damages for a wrongful conviction and incarceration where the prosecutor allegedly (1) violated a criminal defendant's "substantive due process" rights by procuring false testimony *during the criminal investigation*, and then (2) introduced that same testimony against the criminal defendant at trial.

(No. 08-1065, Docket) (emphasis added). This issue in no way relates to the facts in the instant case and is of no precedential value in deciding this dispute. The issues involving a prosecutor's conduct in a criminal matter are in no way analogous to the quasi-judicial immunity afforded to court-appointed child representatives and

custodial evaluators. Indeed, even the Petitioner characterizes this Court's granting of the petition in *Pottawattamie* as being motivated by an interest in resolving a split between the circuits on the issue of absolute prosecutorial immunity that issue has no bearing on the issues raised in this case.

B. Even If Ms. Bischoff Were Not Absolutely Immune, Petitioner's Claims Would Still Have Been Dismissed Because She Did Not Sufficiently Plead The Existence Of A § 1983 Conspiracy

In her appeal to the Seventh Circuit, Petitioner did not dispute that in order to sustain her § 1983 claims she was required to plead the deprivation of a constitutional right resulting from defendants acting under the color of state law. Nor did Petitioner dispute that Ms. Bischoff was not a state actor, and thus could only be liable if she had conspired with a state actor, specifically Judge Nordquist. Although the Seventh Circuit never reached the issue of whether Petitioner's conspiracy allegations were sufficient with respect to Ms. Bischoff because it upheld the dismissal of the Amended Complaint based upon absolute immunity, it is clear from the Seventh Circuit's ruling with respect to the other private actors that Petitioner's conspiracy claims against Ms. Bischoff would also fail because the conspiracy allegations did not sufficiently state a claim.

In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), this Court addressed the sufficiency of conspiracy claims under § 1 of the Sherman Act, holding that "a plaintiff's obligation to provide the 'grounds' of his 'entitlement of relief' requires more than labels and

conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555. Indeed,

> Rule 8(a)(2) still requires a "showing," rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only "fair notice" of the nature of the claim, but also "grounds" on which the claim rests.

Id. at 556 n.3. With respect to the conspiracy allegations in this case, Petitioner was required to state plausible facts that would lead to the conclusion that the Ms. Bischoff and the other defendants "reached an understanding to deprive the plaintiff of [her] constitutional rights," and each of the alleged co-conspirators was a "willful participant in joint activity with" the state actor. *Reynolds v. Jamison*, 488 F.3d 756, 764 (7th Cir. 2007); *see also, e.g., Fries v. Helsper*, 146 F.3d 452, 457-458 (7th Cir. 1998). Consistent with *Twombly*, the Seventh Circuit has held that "mere allegations of joint action or a conspiracy do not demonstrate that the defendants acted under color of law and are not sufficient to survive a motion to dismiss." *Fries*, 146 F.3d at 458. As the Seventh Circuit found with respect to the other alleged co-conspirators, Petitioner also failed to allege specific facts to meet these requirements with respect to Ms. Bischoff. *See Cooney*, 583 F.3d at 970.

Indeed, Petitioner's forty-two page Amended Complaint contains only the following conclusory allegations which fail to establish any agreement between Judge Nordquist and Ms. Bischoff:

- "[Kathryn Bischoff] acted in concert with Judge Nordquist and Dr. Lyle Rossiter to deprive the [Petitioner], of her rights and the rights of her children." (A.178 at 3, ¶ C)

- "Kathryn Bischoff and Dr. Lyle Rossiter, with the aid of Judge Nordquist . . . continued the on going violations of [Petitioner's] Constitutional rights, and the rights of the Orlando minors . . . ." (A.214 at 39)

To mask this deficiency, Petitioner attempted to create the appearance of specificity by compiling a laundry list of alleged misdeeds by Ms. Bischoff and the other defendants individually or in conjunction with each other, but not with Judge Nordquist. Specifically, with respect to Ms. Bischoff, Petitioner alleged that she improperly:

- orchestrated the appointment of Dr. Rossiter, and was the only attorney permitted by Judge Nordquist to have contact with him (A.210 at 35, ¶2);

- orchestrated a "witch hunt" against Petitioner by "planting the seed" with Dr. Rossiter that Petitioner suffered from "Munchausen's by Proxy" syndrome (A.210 at 35, ¶2);

- communicated with Dr. Rossiter on behalf of counsel for the parties, and in-turn, relayed messages from Dr. Rossiter to counsel for the parties (as she was ordered to do) (A.212-13 at 37-38, ¶9);

- received a letter from Dr. Rossiter in which he purportedly stated that Petitioner's parents could pay his and Ms. Bischoff's fees respective fees but that Mr. Orlando could not (A.213 at 39, ¶9);

- may have been responsible for providing a copy of Dr. Rossiter's report to Mr. Orlando's attorney *before* a gag order was put in place (A.211 at 36, ¶ 4);

- subsequently participated in a "chamber conference," (at which Petitioner's counsel also participated), at which a "gag" order was put into place (A.211 at 36, ¶¶4-5).

Even assuming such alleged acts were wrongful, at best they involved joint action between Ms. Bischoff and Dr. Rossiter, or at most between Ms. Bischoff, Dr. Rossiter and the other private defendants. Further, none of the allegations form any plausible basis for inferring that there was an agreement between Ms. Bischoff *and* Judge Nordquist to violate Petitioner's constitutional rights. Accordingly, the Petition should be denied.

CONCLUSION

In light of the Seventh Circuit's proper application of the well-settled law related to the application of absolute quasi-judicial immunity to Ms. Bischoff and the obvious failure of Petitioner to sufficiently plead an actionable conspiracy claim pursuant to § 1983, Ms. Bischoff respectfully requests that this Court deny the Petition.

Respectfully submitted,

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